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No. 02-1500

Supreme Court, U.S.
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In The

Supreme Court of the United States

HAROLD D. EYL, an individual,

Petitioner,

v.

CIBA-GEIGY CORPORATION, a New York Corporation, NORTHEAST COOPERATIVE, a Cooperative Association, and CITY OF WISNER, a political subdivision,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

BRIEF OF THE NATURAL RESOURCES DEFENSE COUNCIL, BEYOND PESTICIDES, AND COMMUNITY RIGHTS COUNSEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v, preempt state-law personal-injury claims premised on the defendants' failure to warn a bystander of a herbicide's hazards and how to avoid those hazards?

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INTEREST OF THE *AMICI CURIAE*[1]

The Natural Resources Defense Council (NRDC) is a non-profit, environmental membership organization with over 500,000 members nationwide. NRDC has a long-standing interest in ensuring that public health is protected from pesticides and preserving the right of States to protect their citizens and the environment beyond the baseline set by the federal government, including the preservation of longstanding common law remedies for inadequate pesticide warnings.

Beyond Pesticides – formerly known as the National Coalition Against the Misuse of Pesticides – was founded in 1981 as a non-profit membership organization to serve as a national network committed to pesticide safety and alternative pest management strategies. The organization's primary goal is to effect change through local action, assisting individuals and community-based organizations to stimulate discussion on the hazards of toxic pesticides, while providing information regarding safe alternatives.

Community Rights Counsel (CRC) is a non-profit, public interest law firm that represents State and local officials in challenges to environmental laws and other community protections. CRC has represented the National Governors Association, the Council of State Governments, and other State and local organizations that have a strong

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

interest in preserving State common law protections against unduly expansive preemption claims. For example, CRC recently filed an *amicus* brief with this Court on behalf of municipal officials in *City of Lodi v. Fireman's Fund Insurance Co.*, No. 02-1169, a preemption challenge to a municipal ordinance that governs the cleanup of toxic waste.

ARGUMENT

I. APPELLATE COURTS ARE HOPELESSLY SPLIT ON THE SCOPE OF FIFRA PREEMPTION.

The deep split of appellate authority on the FIFRA preemption issue raised by Petitioner has led to strikingly disparate results. Because these cases frequently involve life-shattering injuries to innocent bystanders, this conflict among State supreme courts and federal appeals courts calls out for clarification to promote basic standards of consistency and fairness in the law.

Examples of these discordant rulings are legion. Libby Sleath and three co-workers were permitted to pursue common law failure-to-warn claims against a pesticide manufacturer where pesticide applications at their work-place allegedly caused them to suffer headaches, dizziness, and other ailments, forcing them to leave their jobs on advice of their physicians. *Sleath v. West Mont Home Health Servs., Inc.*, 16 P.3d 1042, 1046-53 (Mont. 2000). Yet high schooler Kim Netland's failure-to-warn claims were deemed preempted after his exposure to KenAg Bovinol – a pesticide used to control flies on horses – led to acquired aplastic anemia, which resulted in extreme fatigue, thirty-five blood transfusions, and a hip replacement.

Netland v. Hess & Clark, Inc., 284 F.3d 895, 898-901 (8th Cir. 2002).

Richard Ferebee's children were allowed to collect on common law claims against a pesticide manufacturer after Ferebee's exposure to Paraquat led to his death from pulmonary fibrosis. *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1538-43 (D.C. Cir. 1984). Yet rancher Gary Jenkins was not allowed to pursue failure-to-warn claims where his prolonged use of a weed killer allegedly contributed to his development of non-Hodgkin's lymphoma. *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869, 873-84 (Kan. 1994).

The parents of infants Mary Ellen and Kevin Burke were allowed to prosecute common law claims based on the inadequacy of non-label warnings after they suffered brain damage allegedly due to their mother's exposure to a household pesticide during pregnancy. *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1134-42 (E.D.N.Y. 1992). In so ruling, the court relied on precedent set by the U.S. Court of Appeals for the Second Circuit. *Id.* at 1140-41 (citing *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115 (2d Cir. 1989) (FIFRA does not preempt State off-label warning requirements)). But the U.S. Court of Appeals for the Eighth Circuit did not allow the father of Matthew Arnold to litigate failure-to-warn claims where household insecticides used during Mrs. Arnold's pregnancy allegedly caused Matthew to be born with multiple birth defects. *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607-08 (8th Cir. 1999). Nor were Alexa and Ashley Arnold allowed to pursue failure-to-warn claims where their mother's exposure to household pesticides during pregnancy allegedly caused Alexa to have an intrauterine stroke and Ashley to suffer hepatitis and

pancreatitis. *Arnold v. Dow Chem. Co.*, 110 Cal. Rptr. 2d 722, 730-34 (Ct. App. 2001).

The Supreme Court of Arkansas allowed John Alter to bring common law claims against Ciba-Geigy Corporation for damage to his corn crop caused by the herbicide Dual 8E. *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 141-45 (Ark. 1992). In contrast, the high courts of California and Hawaii did not allow farmers to pursue certain failure-to-warn and other tort claims to recover for crop damage. *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 369-78 (Cal. 2000) (4-3 ruling); *Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055, 1072-75 (Haw. 1997). The Supreme Court of Washington likewise deemed failure-to-warn claims preempted by FIFRA after Catherine Lundberg was injured by an explosion caused by the improper mixture of swimming pool chemicals. *All-Pure Chem. Co. v. White*, 896 P.2d 697, 699-704 (Wash. 1995). Nor did the U.S. Court of Appeals for the Seventh Circuit allow Billy Joe Shaw to litigate failure-to-warn claims after his lungs were permanently damaged by toxic cleansers. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 369-71 (7th Cir. 1993).

In a case remarkably similar to the case at bar, Robert Brown was permitted to pursue common law failure-to-warn claims after he suffered burns that led to amputation of his left foot due to exposure to Weed and Feed, an herbicide fertilizer product. *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846, 848-53 (Or. Ct. App. 1999). But in the instant case, the Supreme Court of Nebraska nullified Petitioner Harold Eyl's jury verdict after exposure to Pramitol ("Total Kill") resulted in painful vasculitis, leaving him permanently disabled and unable to walk without a cane.

The U.S. Court of Appeals for the Fourth Circuit has created even more dissonance by openly splitting from the Tenth and Eleventh Circuits and forging a middle ground on FIFRA preemption, ruling that FIFRA preempts failure-to-warn claims but does not preempt common law claims based on breach of a FIFRA-imposed duty. *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 128 (4th Cir. 1995).

Intervention by this Court is particularly appropriate because lower courts have struggled to reconcile two plurality opinions of the Court. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), a four-Justice plurality rejected a preemption challenge to State common law claims where the applicable statute preempts any State "requirement" relating to the efficacy of medical devices, concluding that the word "requirement" is a "singularly odd word" for Congress to choose if it intends preemption to extend beyond positive law. *Id.* at 487. But just a few years earlier, another four-Justice plurality concluded that the use of the phrase "requirement or prohibition" in a cigarette advertising preemption provision "sweeps broadly" enough to include some common law claims. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992).

Most federal appeals courts that have found preemption of common law claims under FIFRA have done so prior to 1996, without the benefit of the reasoning articulated in *Medtronic*. Indeed, federal appellate panels now assert they are duty-bound to ignore the implications of *Medtronic* because they are required to adhere to pre-*Medtronic* precedent. *E.g. Netland*, 284 F.3d at 899 (rejecting invitation to revisit pre-*Medtronic* precedent). Only review by this Court can definitively resolve the lower court confusion caused by the mixed signals sent by *Medtronic* and *Cipollone*.

In view of the fractured results regarding the scope of FIFRA's preemption provision, commentators repeatedly have called for intervention by this Court. For instance, one observer lamented: "The series of FIFRA preemption cases decided in both federal and state courts in the wake of *Cipollone* is perhaps the most publicized example of the widespread confusion and debate regarding the preemption analysis formulated by the Court in that case." Stephen D. Otero, *The Case Against FIFRA Preemption: Reconciling* Cipollone's *Preemption Approach With Both the Supremacy Clause and Basic Notions of Federalism*, 36 Wm. & Mary L. Rev. 783, 834 (1995).[2]

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[2] *Accord*, Brian M. Brown, *Federal Preemption of State Tort Law Failure to Warn Claims by FIFRA: Injury Without Relief?*, 4 S.C. Envtl. L. J. 147, 175 (1995) ("Hopefully, either Congress or the Supreme Court will realize the possible devastating effects of federal preemption of state failure to warn claims under FIFRA. * * * Until this happens, the courts will continue to guess Congress' intent in enacting Section 136v."); James M. Graves, Ciba-Geigy Corporation v. Alter: *Federal Preemption, FIFRA, and Compensatory Damages in Arkansas*, 48 Ark. L. Rev. 577, 615 (1995) ("[A] close inspection of the language of FIFRA and its legislative history shows there should be no preemption of state common law claims. * * * Unfortunately, many courts seem unwilling to take the time to examine the language and history of FIFRA on its own merits and simply rubber-stamp 'preempted' on such claims."); Sandi L. Pellikaan, *FIFRA Preemption of Common-Law Tort Claims After* Cipollone, 25 Envtl. L. 531, 531 (1995) ("Most courts have either misapplied or incorrectly interpreted the *Cipollone* test and have held that FIFRA preempts common-law claims. Analysis using the *Cipollone* test shows that FIFRA does not preempt common-law tort claims."); R. David Allnut, *FIFRA Preemption of State Common Law Claims After* Cipollone v. Liggett Group, Inc., 68 Wash. L. Rev. 859, 880 (1993) ("Courts holding that section 136v preempts state common law misconstrue Congress's intent in enacting FIFRA and misapply the preemption doctrine articulated in *Cipollone*. Nothing in FIFRA's language or

(Continued on following page)

One California appeals court summarized this regrettable state of affairs with notable understatement: "The law in the area of FIFRA preemption is by no means straightforward." *Arnold*, 110 Cal. Rptr. 2d at 731. In cases involving such tragic injuries, a fair legal system cannot tolerate confusion and disparate results regarding the role of State common law in compensating innocent bystanders injured by the negligence of pesticide manufacturers.[3]

II. OTHER COMPELLING FACTORS WARRANT THIS COURT'S REVIEW.

Several other overriding justifications lend further support to Mr. Eyl's petition.

First, the federal agency charged with implementing FIFRA – the U.S. Environmental Protection Agency – and the U.S. Department of Justice have rejected the FIFRA preemption argument as nothing less than "astonishing."

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legislative history indicates that Congress intended to deprive those injured by pesticides of state common law remedies.").

[3] Indeed, this Court has recognized that FIFRA establishes a "regulatory partnership" between federal and State governments, one that "leaves ample room" for States to control dangerous pesticides. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 613, 615 (1990). Appropriate recognition of State sovereignty counsels against cavalier derogation of common law protections. *E.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 894 (2000) ("Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws – particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers – are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.").

See Brief *Amicus Curiae* for the United States in Support of Plaintiffs-Appellants at 6, *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366 (Cal. 2000) (brief available at http://www.citizen.org/documents/USEtcheverryBrief.pdf). *Amici* agree with EPA that section 136v(b) preempts requirements for labeling or packaging contained in a State's positive law, but leaves longstanding common law protections unaltered. EPA's views underscore not only the severe tension among lower courts regarding the appropriate scope of FIFRA preemption, but also the lack of the requisite clarity in the statute.[4]

Second, FIFRA's extensive legislative history – including four committee reports, more than 2,300 pages of committee hearing transcripts, and five days of floor debate in the Congressional Record – contains not one specific reference to the preemption of State tort law. *Id.* at 22-31. U.S. EPA's General Counsel testified unequivocally in 1972 that the bill that added section 136v to FIFRA "does not affect tort liability," an assertion that prompted no disagreement from any member of Congress or subsequent witness. *Id.* at 27 (quoting hearing testimony); *cf. Medtronic*, 518 U.S. at 487 ("It is, to say the least, difficult to believe that Congress would, without comment, remove all

[4] When the Congress intends to preempt state common law claims, it has shown itself perfectly capable of using language that expresses the requisite clear and manifest intent. *See, e.g.*, 12 U.S.C. § 1715z-17(d) (various mortgage insurance rules "shall not be subject to any State constitution, statute, court decree, common law, rule, or public policy"); 17 U.S.C. § 301(a) (preempting various intellectual property rights "under the common law or statutes of any State."); 29 U.S.C. §§ 1144(a) and (c)(1) (preempting "any and all State laws" including "decisions * * * or other State action having the effect of law").

means of judicial recourse for those injured by illegal conduct * * * .") (internal quotes omitted); *id.* at 491 (if Congress intended to preempt common law remedies, the legislative history's failure to reflect that intent is "spectacularly odd").

Third, review is necessary to restore bedrock principles of statutory interpretation. Most courts that have found preemption have done so by simply noting surface similarities between FIFRA's preemption phraseology and the language construed in *Cipollone*. But they fail altogether to grapple with the many critical distinctions between FIFRA and the statute at issue in *Cipollone*. These key differences are described at length in the Petition (pp. 20-28) and need not be repeated here. But by ignoring these distinctions, the ruling below and comparable rulings commit a fundamental error of statutory construction: the disregard of context. "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *accord, NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used * * * .").

The lower court's ruling also does serious violence to FIFRA's definition of "label" – which encompasses written or graphic matter "accompanying the pesticide" (section 136(p)(2)) – by concluding that it embraces newspaper articles, seminars, and other off-label notices that serve as the predicate of Mr. Eyl's failure-to-warn claims. As Ciba-Geigy witnesses acknowledged (*see* Petition at 11), off-label warnings often are the best means to advise innocent

bystanders like Mr. Eyl of the dangers posed by pesticides. They frequently are necessary precisely because innocent bystanders have no opportunity to learn of a pesticide's threat by reading the label. A common law duty to provide reasonable, off-label notice to the public through newspaper advisories and the like hardly constitutes a "requirement for labeling" preempted by section 136v(b). As Justice Thomas noted earlier this month, "[i]f a federal statute is ambiguous with respect to whether it pre-empts state law, then the presumption against pre-emption should ordinarily prevent a court from concluding that the state law is pre-empted." *Pharmaceutical Research and Mfrs. of America v. Walsh*, 123 S. Ct. 1855, 1877 n.4 (2003) (Thomas, J., concurring in the judgment). *A fortiori*, a court should not deem common law actions predicated on off-label warnings to be preempted, given that FIFRA's preemption provision is limited to labeling requirements.

Fourth, the rulings that have found preemption leave the law utterly incoherent. Because FIFRA itself contains no express private cause of action against manufacturers, the lower court rulings that find preemption often leave innocent bystanders entirely without monetary relief. The Congress surely could not have intended to eliminate remedies for innocent victims of pesticides, products that by design kill living organisms and thus are inherently dangerous. *Compare Medtronic*, 518 U.S. at 487-489 (discussing the "perverse effect" of granting immunity to an industry that, in Congress's judgment, needed more stringent control to protect public health and safety).

Moreover, courts finding preemption have expressed misguided concern that common law failure-to-warn actions might encourage manufacturers to alter pesticide labels to add greater protections for innocent bystanders.

Yet section 136v(a) of FIFRA expressly preserves the authority of States to ban the sale of a pesticide altogether, even if the reason for the ban is inadequate labeling, and even if the ban would encourage the manufacturer to alter the label in the hope of getting the ban lifted. It would make no sense for the Congress to retain sweeping State regulatory authority to ban pesticides (as it clearly has done in section 136v(a)), but to wipe out the more measured remedial relief provided by common law failure-to-warn claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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